In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1123

JACKSON FARMERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

This case presents the same basic question involved in *National Labor Relations Board* v. *Magnesium Casting Co.*, 427 F. 2d 144 (C.A. 1), No. 370, this Term, certiorari granted, October 12, 1970. The issue is whether the Board is required to give plenary review to a regional director's representation determination before entering an unfair labor practice order based on that determination. Here, as in *Magnesium Casting*, the regional director determined appropriate bargaining units for the purposes of conducting representation elections. The Board denied petitioner's request that it review the director's representation determination.

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When petitioner refused to bargain, an unfair labor practice proceeding ensued; the Board again turned down plenary consideration of the director's representation determination, and upheld its trial examiner's summary judgment that petitioner refused to bargain in violation of Section 8(a)(5) of the Act. On the Board's petition for enforcement, the Tenth Circuit followed the First Circuit's decision in *Magnesium Casting*, as it had in its earlier opinion in *Meyer Dairy, Inc.* v. *National Labor Relations Board*, 429 F. 2d 697, and ruled that the Board need not give plenary review to the director's representation determination.

Although these circumstances customarily would suggest that this Court defer action on the instant petition until its decision in *Magnesium Casting*, the issue now presented was not raised before the Board. In *Magnesuim Casting*, the employer specifically challenged the propriety of the Board's refusal to grant plenary review of the director's representation determination in either the unfair labor practice proceeding or the representation proceeding. In contrast, in this case petitioner urged only that it was entitled in the unfair labor practice proceeding to an evidentiary hearing on its contentions respecting the propriety of the elections conducted by the regional director (Pet. App. A5). The raising of this quite distinct issue[1] was insufficient to apprise the Board that peti-

[1] In *Pepsi-Cola Bottling Co.* v. *National Labor Relations Board*, 409 F. 2d 676 (C.A. 2), certiorari denied, 396 U.S. 904, the court emphasized that its decision did not require the Board "to grant a hearing *de novo* on a proceeding properly delegated

tioner desired it to review the representation determination before issuing an unfair labor practice order.[2] Accordingly, judicial review of the question whether the Board was required to grant plenary review, as distinct from a *de novo* evidentiary hearing, is foreclosed under Section 10(e) of the Act.[3] *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255–256; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350. See *National Labor Relations Board* v. *Brush-Moore Newspapers, Inc.*, 413 F. 2d 809 (C.A. 6), No. 665, 1969 Term, certiorari denied, 396 U.S. 1002.

In these circumstances, the petition should be denied irrespective of the outcome of *Magnesium Casting*.

Respectfully submitted.

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JANUARY 1971.

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to a Regional Director," but only "to review what that official has decided and to make its own determination as to whether the Regional Director's decision was right". 409 F. 2d at 681–682.

[2] The court below found it unnecessary to "consider whether the request for a hearing was sufficient to preserve the point" because of its recent decision in *Meyer Dairy* sustaining the procedure utilized by the Board (Pet. App. A18).

[3] That section, in relevant part, provides: "No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." No such circumstances exist here.

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